

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALANIS LOZA,

Defendant and Appellant.

H032679

(Santa Cruz County

Super. Ct. No. F15811)

**INTRODUCTION**

In this case, we are presented with the question whether there was sufficient evidence of a “criminal street gang” as defined under the California Street Terrorism Enforcement and Prevention Act (Pen. Code, § 186.20 et seq. (STEP Act))<sup>1</sup> to support a gang enhancement found to be true and a conviction for the separate offense of active participation in a criminal street gang. We find insufficient evidence and reverse the judgment.

---

<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise stated.

## STATEMENT OF THE CASE

Defendant Luis Loza was convicted by jury of one count of robbery (§ 211) and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true a special allegation that defendant had committed the robbery “for the benefit of, at the direction of, or in association with [any] criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members” in violation of section 186.22, subdivision (b)(1) (hereafter gang enhancement). The jury deadlocked on an enhancement allegation that defendant had used a gun or replica gun (§ 12022, subd. (b)(1)) to commit the robbery. The court declared a mistrial with regard to the gun enhancement and dismissed that allegation.

The court sentenced defendant to three years in prison for the robbery, struck the punishment that “would otherwise be ten years” for the gang enhancement on the robbery count, and sentenced defendant to two years concurrent for active participation in a street gang.

On appeal, defendant challenges the sufficiency of the evidence to support his conviction for active participation in a street gang and the true finding on the gang enhancement on the robbery count. He argues that there was insufficient evidence that the primary activities of the gang with which he was affiliated, the North Side Santa Cruz (NSSC) gang, included offenses enumerated in the gang statute (§ 186.22, subd. (e)) and that there was insufficient evidence that the NSSC engaged in a pattern of criminal activity within the meaning of the gang statute because the predicate offenses the prosecution relied on were not committed by the NSSC gang. We agree and reverse the judgment.

## FACTS

### *I. Prosecution Case*

#### **A. Robbery On August 21, 2007 (Count 1)**

On August 21, 2007, Tosten Walsh, John Swint, and Mike Daniel, three skateboarders in their early 20's, went to the skate bowl at Derby Park in Santa Cruz. As they were leaving, three Hispanic males in their 20's, one of whom was defendant, approached and asked them their names, where they were from, and whether they had any marijuana. Walsh and Daniel had seen defendant at the park earlier that evening and on prior occasions.

Defendant asked, “[D]o you know what a strap is?” One of the men said it meant they had a gun. According to Daniel, defendant pulled what looked like a gun from his waistband, put it under his shirt, and pointed it at the skateboarders. Walsh saw defendant lift his shirt and put his hands on the handle of a black gun.

The three men (hereafter “robbers”) told the skateboarders to empty their pockets. The robbers stole about \$90 and some marijuana from Walsh and \$1.50 and a lighter from Swint. Daniel gave them a cell phone and a small amount of marijuana, both of which the robbers returned to him. The robbers said “Norte” several times; they said it was “Norte territory” and “Norteno territory.” The robbers told the skateboarders not to tell anyone about the robbery. They said, “[D]on’t ever come back to the park again” and left. The skateboarders did not report the robbery to the police because they were frightened and had been threatened.

After the robbery, Walsh called his friend Matthew Wyatt and told him about the robbery. Wyatt had been at the park that day and had noticed defendant while skateboarding, but did not witness the robbery.

## **B. Active Participation in a Street Gang (Count 2)**

On August 23, 2007, Walsh and Wyatt went skateboarding at Derby Park. Walsh saw defendant and told Wyatt that defendant was the “guy” who robbed him two days before. Walsh skated for 15 to 20 minutes and left.

While skateboarding, Wyatt saw defendant, who was with three other men, punch skateboarder Chad Underhill in the face three times. According to Wyatt, Underhill did not attack or provoke defendant. Wyatt called 911 on his cell phone. As he spoke to the 911 operator, defendant and two other men called him a “snitch” and chased him out of the park.

Meanwhile, Walsh saw “three younger kids” come running out of the park. “They were pretty badly beaten. One looked like he had a broken nose.” Another had blood on his face. They said they had just been beaten up.

Santa Cruz police officers responded to Wyatt’s call and detained defendant. Wyatt identified defendant and told the officers that defendant had punched Underhill and chased Wyatt out of the park. Walsh reported the robbery and identified defendant as one of the robbers. The officers photographed defendant, his clothing and tattoos, and the gang graffiti in the park.

## **C. Gang Evidence**

Santa Cruz Police Detective Arnold Vasquez testified as the prosecution’s gang expert. Detective Vasquez had been a police officer for eight years and a gang investigator for three years. He was on the Santa Cruz County Joint Agency Gang Task Force and had participated in at least 40 task force operations and investigated approximately 100 gang crimes. He focused on Hispanic street gangs and has had hundreds of contacts with both Norteño and Sureño gang members.

Detective Vasquez explained that the Norteños are an “umbrella gang,” a street gang that falls under the authority of the Nuestra Familia prison gang. The Norteños are

composed of a number of “small subsets,” neighborhood or territory street gangs that claim a specific geographic region. Detective Vasquez testified that defendant was an active member of a Norteño gang, the NSSC gang. There are approximately 500 Norteño gang members in Santa Cruz County, 10 to 14 of whom are members of the NSSC subset.

Norteño gang members identify with the color red and the number 14. They identify with the number 14 because N, which they associate with “Norteño” and “Nuestra Familia,” is the 14th letter in the alphabet. Norteños represent the number 14 in various ways in tattoos, graffiti and other writings, including the Roman numeral “XIV”; “X and a 4”; “catorce,” which is Spanish for 14; one dot with four dots; or just plain “14.”

The rival gang to the Norteños is the Sureños. Sureños identify with the color blue and the number 13. They identify with the number 13 because their parent prison gang, the Mexican Mafia, is referred to as “La Eme,” the Spanish word for the letter M, the 13th letter of the alphabet. The Norteños and the Sureños are enemies in Santa Cruz County.

Detective Vasquez explained that there are different levels of gang participation. There are (1) “shot callers” or gang leaders; (2) active gang members; and (3) “wannabes” or associate members. There are different ways a person can join a gang, including “being crimed in,” “putting in work,” being “jumped in” or being “walked in.”<sup>2</sup>

Detective Vasquez was familiar with the Norteño gang NSSC. He testified that although it has been disorganized for some time, NSSC has active participants. Detective Vasquez has contacted some of the gang’s members and read police reports about the

---

<sup>2</sup> Being “walked in” means an older sibling or family member vouches for the new member. The new member still has to prove himself to the gang. A prospective gang member who is “jumped in” is beaten up. “Putting in work” or being “crimed in” includes such things as tagging, driving a getaway car, being a lookout during a fight, or committing crimes. The crimes can be simple battery up to murder.

NSSC. Detective Vasquez opined that the NSSC is a criminal street gang as defined in section 186.22. He explained that the gang has three or more members who use a common sign (the letter N, the color red, the number 14, and the abbreviation NSSC) and engage in a pattern of criminal activity. In support of his conclusion that the NSSC engaged in a pattern of criminal activity, Detective Vasquez testified regarding two criminal convictions involving two Norteño gang members from Watsonville who were not members of NSSC. We shall discuss that testimony further as part of our analysis.

Detective Vasquez had contact with defendant on several occasions in conjunction with different investigations. He described a series of contacts he and other law enforcement officers had with defendant dating back to 2001. Defendant was contacted by Watsonville police officers in October 2001, when he was 18 years old, and admitted being an NSSC member for approximately four months. The following day, defendant was contacted by Santa Cruz police. He was wearing a red belt with the letter “N” on the buckle and red boxer shorts and was in the company of Ruben Gonzalez, an NSSC gang member. In July 2002, defendant was contacted by Capitola police. Defendant admitted affiliation with the NSSC; he was with an active NSSC gang member, Mauricio Bortz. In November 2002 and April 2003, defendant was contacted by Santa Cruz police. Both times, defendant was with Jason Gustos, an admitted NSSC member. In 2003, defendant admitted he had been a member of NSSC for two years. On August 7, 2004, Scotts Valley police reported that defendant was with Jose Pepe Ramirez, an admitted NSSC member.

Santa Cruz Police Detective David Forbus testified that he contacted defendant in August 2005. Defendant told Detective Forbus that he “used to run” with NSSC, that he was with the gang for 12 years, but that he was no longer active. Detective Forbus noted that defendant had the “14 Bonds” in his wallet. The “14 Bonds” are rules that have been established by the Nuestra Familia gang for Norteño gang members. They are the bylaws

of the gang. They were established in 1996 to stop fighting among Norteño gangs and to establish rules for gang members to follow if they are taken into custody.

According to Detective Vasquez, gang members used to admit their gang membership quite frequently, but do not do so as much anymore to avoid prosecution for gang-related crimes. An order that came in conjunction with the 14 Bonds instructed gang members not to get tattoos and not to claim specific neighborhoods like NSSC and to claim Norteño instead to prevent law enforcement from identifying them as gang members.

Detective Vasquez contacted defendant in August 2005 and noted that he used the gang monikers “Lulu” and “Luis Locs.” Defendant had “Lulu” or “Luis Locs” as the screen saver on his cell phone. Detective Vasquez contacted defendant again in October 2006 during a gang task force operation. Defendant was at a party with NSSC member Jaime Ohler. Defendant was wearing gang clothing and had “Luis Locs” written under the brim of his hat.

Defendant’s tattoos included “NSSC” on his abdomen, a single dot on his right wrist and four dots on his left wrist, and a tattoo of his surname (Loza) in old English lettering across his shoulders. According to Detective Vasquez, a tattoo of the last name in old English lettering is common among gang members. Defendant also had a tattoo of a “Huelga Bird,”<sup>3</sup> a symbol used by the United Farm Workers that Norteños identify with, with “NSSC” below it on his right shoulder. Detective Vasquez explained that gang tattoos show allegiance to the gang and stature or rank within a gang. Gang tattoos have to be earned by doing work for the gang; one does not merely get the tattoo.

At the time of his arrest in this case, defendant was wearing a hat with “NSSC X4” written under the brim.

---

<sup>3</sup> “Huelga” is the Spanish word for “strike,” in the sense of a work stoppage.

Detective Vasquez opined that defendant was a Norteño gang member based on his association with Norteños on several occasions and his possession of the 14 Bonds. He opined that defendant was an active participant in the Norteño gang because he had been contacted several times with documented NSSC members, admitted his gang affiliation more than once, and had gang tattoos. On cross-examination, Detective Vasquez admitted that none of the police contacts with defendant had resulted in prosecutions for gang-related offenses.<sup>4</sup>

Detective Vasquez took a statement from defendant on August 23, 2007. Defendant said he was at Derby Park that day, but was not involved in the assault. He said that prior to that day, he had not been at the park in over two years and that he was at the Watsonville home of Bobby and Julia Ragan on August 21, 2007, the day of the robbery. Defendant explained that he took care of his mother, who was a kidney dialysis patient, during the day and stayed at the Ragans's at night.

Detective Vasquez executed a search warrant at the Ragan home and found evidence of gang affiliation, including a large stand ashtray and a piece of wood with "N," "NSSC," "Lulu Locs," the Huelga bird, and "14" painted on them, as well as gang clothing and CD's in the bedroom where Julia Ragan's brother stayed. The prosecution presented evidence of gang tagging on the fences and skate bowl at Derby Park, including "NSSC," "Lulu Locs," "X4," "Lulu" and "14." Detective Vasquez opined that the robbery in Derby Park was done for the benefit of a Norteño street gang and that the gang was trying to claim the park.

In December 2007, four months after the offenses at issue in this case, sheriff's deputies were investigating a report of tagging near Sunny Cove in Santa Cruz.

---

<sup>4</sup> Defendant had four prior misdemeanor convictions for receiving stolen property, driving on a suspended license, grand theft, and burglary. He was on probation continuously from November 2001 until the date of the robbery in this case. That information was not before the jury.



Detective Burrell testified that he stopped defendant and one other man and discovered fresh red graffiti stating “NSSC XIV” on a roadside barricade and “XIV” on a street sign. The detective found a can of red spray paint nearby and saw red paint splatter on defendant’s T-shirt and pants.<sup>5</sup>

## *II. Defense Case*

Defendant did not testify. He relied on an alibi defense and attacked the eyewitness identifications.

Underhill testified that two men came up to him in Derby Park and asked for his wallet. When he refused, one of them punched him in the nose. Underhill did not recall what his assailant looked like other than his height.

Julia and Bobby Ragan testified that defendant was with them at their Watsonville home at the time of the robbery. Bobby Ragan testified that defendant was trying to stay away from gangs; that he wanted to get a job and stay out of trouble. Detective Vasquez opined that Bobby Ragan was an associate member of a Norteño gang and testified that Julia Ragan had family members, including a brother who lived with the Ragans, who were Norteño gang members.

Robert Shomer, Ph.D., testified as an expert on eyewitness identification, memory and perception. He testified that eyewitness identification is the least reliable means of identifying someone and that there were problems with the eyewitness identifications of defendant in this case.

---

<sup>5</sup> This incident was the subject of a separate prosecution in Santa Cruz County case number F16266.

## DISCUSSION

### *I. Contentions*

Defendant contends there was insufficient evidence to support the true finding on the gang enhancement on the robbery count or the guilty verdict on the active participation in a criminal street gang count. Defendant argues that there was insufficient evidence that NSSC was a “criminal street gang,” as defined in section 186.22, subdivision (f), because there was insufficient evidence that NSSC’s *primary activities* included the commission of one or more of the felonies enumerated in section 186.22, subdivision (e) or that NSSC “members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*.” (§ 186.22, subd. (f), italics added.)

### *II. Legal Framework*

#### **A. Standard of Review**

Our determination whether substantial evidence supports the judgment is based upon whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576.) “In making this determination, the appellate court ‘must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citations.] . . . “[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record*. . . . Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*. . . .” ’ ’ ” (*People v. Barnes* (1986) 42 Cal.3d 284, 303; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) “Evidence, to be ‘substantial’ must be ‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ ” (*People v. Johnson*, at p. 576.)

The sufficiency-of-the-evidence standard that applies to our review of criminal convictions also applies to a challenge to a true finding on a gang enhancement. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224 (*Vy*); *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [appellate court’s “role is limited”].) Accordingly, we apply that same standard in evaluating defendant’s claims here.

## **B. Use of Gang Experts**

The prosecution may utilize expert testimony concerning criminal street gangs to establish the elements of the gang allegations. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*).) Matters beyond the common experience of jurors, such as the culture, habits, and psychology of criminal street gangs, are properly the subject of expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); see also *People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*).) In *People v. Gamez* (1991) 235 Cal.App.3d 957 (disapproved on other grounds in *Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10), “the defendant acknowledged the propriety of testimony by a gang expert concerning territory, retaliation, graffiti, hand signals, and dress. However, he objected to, among other things, testimony that various individuals, including defendant, were members of particular gangs. (235 Cal.App.3d at p. 964.) The court concluded that the defendant’s membership in a gang was a matter beyond the common knowledge of jurors and thus a proper subject of expert testimony. (*Id.* at p. 965 . . . .)” (*Valdez, supra*, at p. 506.)

## **C. California Street Terrorism Enforcement and Prevention Act (STEP Act)**

### ***1. Gang Enhancement (§ 186.22, subd. (b)(1))***

One of the components of the STEP Act at issue here is section 186.22, subdivision (b)(1), which provides for a sentence enhancement when the defendant “is convicted of a felony committed for the benefit of, at the direction of, or in association

with any criminal street gang, with a specific intent to promote, further, or assist in any criminal conduct by gang members.”<sup>6</sup> Under the statute, there are three main aspects of this gang enhancement, namely, that the crime was (1) “committed for the benefit of, at the direction of, or in association with” (2) “any criminal street gang,” as defined by the statute, and (3) the defendant committed the crime “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22(b)(1); see also *Gardeley*, *supra*, 14 Cal.4th at pp. 616-617.)

## **2. Substantive Gang Offense (§ 186.22, *subd.* (a))**

The other STEP Act provision relevant here, section 186.22, subdivision (a), makes street terrorism, i.e., the active participation in any criminal street gang, a separate criminal offense. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466 (*Jose P.*)). Section 186.22, subdivision (a) provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

---

<sup>6</sup> Section 186.22, subdivision (b)(1) provides: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with a specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court’s discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.”

“The elements of the offense of participation in a criminal street gang are: (1) the existence of a ‘criminal street gang’; (2) defendant’s ‘active’ participation in that gang; (3) defendant’s knowledge that ‘its members engage in or have engaged in a pattern of criminal gang activity’; and (4) defendant’s willful promotion, furtherance, or assistance ‘in any felonious criminal conduct by members of that gang.’ ” (*In re Lincoln J.* (1990) 223 Cal.App.3d 322, 327, quoting § 186.22, subd. (a).) “[A] person ‘actively participates in any criminal street gang,’ within the meaning of section 186.22(a), by ‘involvement with a criminal street gang that is more than nominal or passive.’ ” (*People v. Castaneda* (2000) 23 Cal.4th 743, 752.)

### ***3. Definition of a “Criminal Street Gang” (§ 186.22, subd. (f))***

The substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) and the gang enhancement (§ 186.22, subd. (b)(1)) share the common element of proof of a criminal street gang as defined under the STEP Act. (*Jose P., supra*, 106 Cal.App.4th at p. 466.) “The existence of a criminal street gang is unquestionably an element of both the enhancement and the substantive offense.” (*Ibid.*)

The term “criminal street gang” is defined in section 186.22, subdivision (f), as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (Italics added.) Under the statute, the prosecution must show that the “[criminal street] gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in

a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period.” (*Gardeley, supra*, 14 Cal.4th at p. 617.)

Defendant challenges the sufficiency of the evidence of two of the factual showings required to prove a “criminal street gang” under section 186.22, subdivision (f). He argues that there was insufficient evidence of the primary activities of the NSSC gang and insufficient evidence that the NSSC gang committed the required number of predicate offenses.

### ***III. Evidence of Gang’s Primary Activities***

#### **A. Applicable Law**

The California Supreme Court has held that “[t]he phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the [crimes enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e) of section 186.22<sup>7</sup>] is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.]

---

<sup>7</sup> The crimes that may serve as the basis for the “primary activities” element necessary to prove the existence of a criminal street gang are listed in “paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e)” of section 186.22. (§ 186.22, subd. (f).) They include: “(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245. [¶] (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1. [¶] (3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1. [¶] (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code. [¶] (5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246. [¶] (6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034. [¶] (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13. [¶] (8) The intimidation of witnesses and victims, as defined in Section 136.1. [¶] (9) Grand theft, as defined in subdivision (a) or (c) of Section 487. [¶] (10) Grand theft of any firearm, vehicle, trailer, or vessel. [¶] (11) Burglary, as defined in Section 459. [¶] (12) Rape, as defined in Section 261. [¶] (13) Looting, as defined in Section 463. [¶] (14) Money laundering, as defined in Section

That definition would necessarily exclude the occasional commission of those crimes by the group’s members.” (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) The court explained: “ ‘Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s]. . . .’ ” (*Id.* at pp. 323-324.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley* . . . . There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on ‘his personal investigations of hundreds of crimes committed by gang members,’ together with information from colleagues in his own police department and other law enforcement agencies.” (*Id.*, at p. 324.)

In determining whether the “primary activities” element is satisfied, the factfinder may consider evidence of past and present conduct by gang members involving the

---

186.10. [¶] (15) Kidnapping, as defined in Section 207. [¶] (16) Mayhem, as defined in Section 203. [¶] (17) Aggravated mayhem, as defined in Section 205. [¶] (18) Torture, as defined in Section 206. [¶] (19) Felony extortion, as defined in Sections 518 and 520. [¶] (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594. [¶] (21) Carjacking, as defined in Section 215. [¶] (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072. [¶] (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101. [¶] (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422. [¶] (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code. [¶] . . . [¶] (31) Prohibited possession of a firearm in violation of Section 12021. [¶] (32) Carrying a concealed firearm in violation of Section 12025. [¶] (33) Carrying a loaded firearm in violation of Section 12031.” (*Ibid.*)

commission of the offenses enumerated in section 186.22, subdivision (e), paragraphs (1) through (25) or (31) through (33) inclusive, including the charged offense.

(*Sengpadychith, supra*, 26 Cal.4th at p. 323; see also *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.)

## **B. Background**

During trial, Detective Vasquez opined that NSSC is a Norteño criminal street gang because “they have three-or-more members. They have a common sign or symbol, which would include the red clothing, the N, the Number 14 and I guess their moniker or gang name, North Side Santa Cruz, which they use a tagging of NSSC. . . . Of those members, they engage in a pattern of criminal activity and because of those . . . that’s the definition of a criminal street gang by the Penal Code, so they do fall under that.”

Detective Vasquez opined that defendant had knowledge that Norteños “engage in a pattern of criminal activity” based on defendant’s association with other Norteño gang members on several different contacts. All of the contacts Detective Vasquez described involved NSSC gang members and none of the contacts resulted in a criminal prosecution of defendant. The expert stated, “In addition, just the fact that he was in possession of the 14 bonds. That shows that he actually has connections, not only to the regular street-level gang members, but also gang members that are higher up, whether they are in county jail, a county facility or a state prison.”

When asked whether he was aware of any felony prosecutions of any members of the NSSC gang in Santa Cruz during the five-year period prior to August 23, 2007, Detective Vasquez responded that he was aware of one such prosecution. Prior to trial, the prosecution had made a motion in limine to exclude evidence regarding that case. After a side bar conference, defense counsel agreed not to question Detective Vasquez further regarding the case and no evidence was presented regarding the nature of the offense, the date of the crime, or the person involved.



Detective Vasquez testified that NSSC was a criminal street gang because the gang's members engaged in a "pattern of criminal activity." With regard to the specific predicate offenses required to prove a pattern of criminal activity, Detective Vasquez testified regarding the criminal convictions of two Norteño gang members from Watsonville.

The first case involved Francisco Javier Vasquez, who was convicted by plea of attempted second degree robbery (§§ 211, 664) and active participation in a street gang (§ 186.22, subd. (a)). He also admitted gang enhancement allegations (§ 186.22, subd. (b)(1)) on the attempted robbery count. Both offenses occurred in March 2007. Detective Vasquez testified that the victim of the attempted robbery had reported that during the offense, the perpetrators yelled "puro City Hall," which meant "it's all about City Hall, City Hall is controlling this neighborhood," and referred to the victim as "scrapa," which means "as a scrap" a term Norteños use as a derogatory remark when talking about Sureños. Detective Vasquez opined that defendant Vasquez was an active member "of a Norteño gang, specifically City Hall." On cross, he admitted that the crime did not involve defendant or NSSC.

The second case involved Richard Juan Martinez, Jr., who was convicted by plea of assault with a deadly weapon (§ 245, subd. (a)(1)) and active participation in a criminal street gang (§ 186.22, subd. (a)).<sup>8</sup> Martinez admitted an enhancement allegation that the assault was committed for the benefit of a criminal street gang. The offenses were the result of a fight that occurred at a gas station in Watsonville in February 2007. The complaint alleged that the defendant used a knife. Detective Vasquez testified that the victim was stabbed and that the police found the defendant in a car with a "Samurai-type sword." Detective Vasquez opined that Martinez was a member of "the Norteño

---

<sup>8</sup> Martinez was also charged with attempted second degree robbery (§ 211) and possession of a deadly weapon (§ 12020, subd. (a)(1)). Those charges were dismissed by the prosecutor in view of the pleas on the other counts.

criminal street gang.” On cross-examination, he testified that the Watson Varrio Norte gang committed the offense.

In argument, when describing the primary activities of defendant’s gang, the prosecution relied on the criminal convictions of Vasquez and Martinez.

### **C. Analysis**

In our view, the evidence presented here was insufficient to prove the primary activities element necessary to show that defendant was an active participant in a *criminal street gang* for the purpose of the substantive offense (§ 186.22, subd. (a)) or that he committed the robbery “for the benefit of, at the direction of, or in association with any *criminal street gang*” for the purpose of the gang enhancement (§ 186.22, subd (b)(1), italics added).

Detective Vasquez’s testimony was distinguishable from that of the gang expert in *Gardeley*, which the court concluded was sufficient to support the gang findings. As noted above, the police gang expert in *Gardeley* testified that the primary activities of the gang the defendant had been a member of for nine years were drug dealing and witness intimidation, two of the offenses enumerated in section 186.22. (See § 186.22, subd. (e)(4) & (8).) The gang expert’s opinion was based on conversations he had had with the defendant and his fellow gang members, on the expert’s “personal investigations of hundreds of crimes committed by gang members,” as well as information from colleagues in his own police department and other law enforcement agencies. (*Gardeley*, *supra*, 14 Cal.4th at p. 620; *id.* at p. 611.)

The court in *In re Alexander L.* (2007) 149 Cal.App.4th 605, a case cited by defendant, concluded that there was insufficient evidence of the gang’s primary activities to support a street gang enhancement. In *Alexander L.*, a minor was alleged to have committed vandalism based on his “tagging” activities. In support of the charged gang enhancement, an expert testified that graffiti generally benefited a gang and that the

minor's gang, Varrio Viejo, was "an active street gang" as of the date of the minor's arrest. When asked about the gang's primary activities, the expert testified, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" No further questions were asked about the gang's primary activities on direct or redirect examination." (*Id.* at p. 611.) The court concluded that that was insufficient evidence of Varrio Viejo's primary activities, stating, "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. [The expert] did not directly testify that criminal activities constituted [the gang's] primary activities" and had stated that the vast majority of the cases connected to the gang were graffiti related. (*Id.* at pp. 611-612.) The expert in *Alexander L.* also testified about two specific crimes committed by two Varrio Viejo members, assault with a deadly weapon and assault with force likely to cause great bodily injury. In one case, the defendant was acquitted of gang offenses; the court did not say whether the other involved gang allegations. The Attorney General argued that taken together, the two crimes and the expert's testimony provided sufficient evidence of the gang's primary activities. The appellate court rejected that argument, stating, "Without more, the two convictions do not provide substantial evidence that gang members had 'consistently and repeatedly . . . committed criminal activity listed in the gang statute.'" (*Id.* at p. 614, citing *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

Unlike the expert in *Gardeley*, Detective Vasquez did not identify the primary activities of the NSSC or of the "umbrella" Norteño gang in the Santa Cruz area. He did not testify regarding any crimes engaged in by the NSSC or the Norteños, other than the convictions of Vasquez and Martinez, members of two Watsonville Norteño gangs. As we discuss further when we address the predicate offenses element, in our view, it is not appropriate to consider the activities of the two gang members from Watsonville, who

were not NSSC members, as proof of the primary activities of NSSC gang members. Even if we were to consider the convictions of Vasquez and Martinez, “[w]ithout more, the[se] two convictions do not provide substantial evidence that gang members had “*consistently and repeatedly* . . . committed criminal activity listed in the gang statute.” (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 614.)

There was evidence of NSSC tagging in Derby Park. However, tagging is not one of the gang offenses listed in section 186.22 unless it amounts to felony vandalism “as defined in paragraph (1) of subdivision (b) of Section 594.” (§ 186.22, subd (e)(20).) Felony vandalism as defined in section 594, subdivision (b)(1) requires proof of “defacement, damage, or destruction” valued at \$400 or more. In this case, there was no evidence regarding the value of the damage attributable to NSSC tags in Derby Park. There was evidence that defendant was involved in a tagging incident at Sandy Cove four months after the dates of the robbery and the assaults at Derby Park. Aside from the fact that the tagging in Sandy Cove occurred after the events in Derby Park, there was no evidence that the tagging at Sandy Cove resulted in damages of \$400 or more. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 (*Duran*) [crimes occurring after the charged offense cannot be used to prove a pattern of criminal gang activity].)

Neither the gang expert nor the prosecutor relied on the events of August 21, 2007, or August 23, 2007, to prove the primary activities element necessary for proof of a criminal street gang.

On this record, we cannot say that the prosecution met its burden of presenting evidence regarding the primary activities of the NSSC gang or even the “umbrella” Norteño gang in the Santa Cruz area, since there was no evidence that “the group’s members *consistently and repeatedly*” committed any of the criminal activity listed in the gang statute. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

#### ***IV. Evidence of Gang's Predicate Offenses***

##### **A. Applicable Law**

Defendant contends that there was insufficient evidence that he was a member of a criminal street gang because there was insufficient evidence NSSC members “either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period.” (*Gardeley*, *supra*, 14 Cal.4th at p. 617.)

Section 186.22, subdivision (e) provides that “ ‘pattern of criminal gang activity’ means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” The statute lists 33 crimes that qualify as predicate offenses. The prosecution may establish the requisite “pattern of criminal gang activity” (§ 186.22, subd (e)) with “evidence of the defendant’s commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member.” (*People v. Loeun* (1997) 17 Cal.4th 1, 10 [defendant committed an assault with a deadly weapon using a baseball bat at the same time a fellow gang member committed a separate assault with a deadly weapon using a tire iron].) However, the prosecution may not rely on the contemporaneous activity of a fellow gang member who aids and abets the perpetrator to prove one of the predicate offenses. (*People v. Zermeno* (1999) 21 Cal.4th 927, 931-933.) Moreover, crimes “occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*Duran*, *supra*, 97 Cal.App.4th at p. 1458.)

## **B. Background**

Defendant moved in limine to bifurcate the trial of the gang offense and the gang enhancement arguing that the predicate offenses the prosecution intended to use were prejudicial because they involved very serious crimes committed by men from Watsonville, who were members of other gangs and not the NSSC gang. While discussing that motion, the court stated, “It’s difficult in this County, unless something has happened here in the past six months or it’s been a year since I’ve heard one of these North Side Santa Cruz cases, is you can’t come up with predicate acts for North Side Santa Cruz or you couldn’t. . . . There are more broad Norteño incidents than the groups that are specifically identified as North Side Santa Cruz.” The court denied the motion to bifurcate and held, “That’s an issue for cross-examination.”

When testifying about the predicate offenses, Detective Vasquez relied on the convictions of Vasquez and Martinez, the two Watsonville Norteño gang members. In argument, when the prosecution discussed the predicate offenses, he relied on the convictions of Vasquez and Martinez, as well as defendant’s robbery conviction in this case.

## **C. Analysis**

In our view, the evidence presented here was insufficient to prove the predicate offenses necessary to show that defendant was an active participant in a *criminal street gang* for the purpose of the substantive offense (§ 186.22, subd. (a)) or that he committed the robbery “for the benefit of, at the direction of, or in association with any *criminal street gang*” for the purpose of the gang enhancement (§ 186.22, subd (b)(1), italics added). Two reasons support this view. First, there was no evidence that NSSC gang members had committed two predicate offenses. Second, the cases that the prosecutor relied on as predicate offenses did not involve members of the NSSC gang and had no connection to defendant. We discuss each of these reasons in further detail below.

As noted above, the prosecution may use the charged offense as one of the two predicate offenses. Here, the prosecutor argued that the predicate offenses included defendant's August 21, 2007 robbery in Derby Park. But there was no evidence of a second offense by an NSSC member that qualified as a predicate offense.<sup>9</sup>

Although Detective Vasquez testified that he was aware of one other criminal prosecution involving an NSSC gang member, no evidence or information regarding that case was presented at trial. Consequently, there was no evidence from which to determine whether the offense met the statutory requirements related to the type of offense or the timing of the offense.

Defendant's tagging activity in Sandy Cove in December 2007 also does not qualify as a predicate offense since it occurred four months after the robbery in Derby Park. As noted previously, crimes "occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*Duran, supra*, 97 Cal.App.4th at p. 1458.)

In his brief, the Attorney General relies on "appellant's involvement in a robbery and battery in association with NSSC members in 2002." However, there was no evidence that defendant was involved in a robbery and battery in association with other NSSC gang members in 2002. In the portion of the record that the Attorney General

---

<sup>9</sup> Defendant's conviction for street terrorism arising out of the events of August 23, 2007, cannot be used as a predicate offense for the gang enhancement on the robbery conviction, since it occurred after the robbery. (*Duran, supra*, 97 Cal.App.4th at p. 1458.) In addition, street terrorism is not among the predicate offenses listed in section 186.22, subdivision (e). Although there were three robbery victims, defendant's robbery in Derby Park counts as a single predicate offense, since section 186.22, subdivision (e), requires that predicate offenses be "committed on separate occasions, or by two or more persons." The Attorney General does not argue that the activities of defendant's companions on August 21, 2007, amount to a separate robbery or witness intimidation (§ 186.22, subd. (e)(2), (8)) that qualify as predicate offenses. Since the prosecution did not argue this theory below and this theory is not advanced on appeal, we shall not address this possibility further.

cites, Detective Vasquez testified that in November 2002, defendant was stopped by Santa Cruz police in the company of Jason Gustos, an admitted NSSC member. He also testified that in July 2002, defendant was stopped by Capitola police at the Capitola Mall in the company of Mauricio Bortz and that both men admitted their affiliation with NSSC. But there was no evidence that defendant or his companions were involved in a robbery or a battery on those occasions. With regard to the Capitola incident, the prosecutor told Detective Vasquez, “I don’t want you to get into what they were doing there.” And on cross, Detective Vasquez testified that none of his prior contacts with defendant had resulted in criminal prosecutions. The prosecution’s motion in limine indicates that defendant was a suspect in a battery and robbery that occurred in Watsonville in December 2003. However, defendant was not prosecuted in that case and that evidence was not before the jury. Moreover, defendant’s prior criminal history does not include convictions for either robbery or battery.

The two cases that the prosecutor relied on as predicate offenses did not involve members of the NSSC gang. They involved gang members from Watsonville who were members of the City Hall and Watson Varrio Norte subsets of the Norteño street gang. The crimes in both cases occurred in Watsonville. We take judicial notice of the facts that Watsonville is approximately 20 miles south of Santa Cruz and that six or seven other communities are located between Santa Cruz and Watsonville. (Evid. Code, §§ 452, subds. (g), (h).) Furthermore, there was no evidence that connected defendant to the City Hall and Watson Vario Norte gangs. There was no evidence that the crimes committed by Vasquez and Martinez in Watsonville were in any way related to defendant or the NSSC gang. There was no evidence that the robbery or other activity in Derby Park was in any way connected to the City Hall and Watson Vario Norte gangs. There was no evidence that the police ever contacted defendant in the company of City Hall or Watson Varrio Norte gang members or that the different Norteño subset gangs in Santa Cruz and Watsonville worked together. To the contrary, there was evidence that Vasquez



yelled “City Hall” or “puro City Hall” when committing the robbery, which meant “it’s all about City Hall, City Hall is controlling this neighborhood.” This suggests the offense was territorial in nature; that the City Hall gang in Watsonville was staking out a claim to the neighborhood where the robbery occurred.

Citing *People v. Augborne* (2002) 104 Cal.App.4th 362, 370-371 (*Augborne*), the Attorney General argues that “there was no requirement that the offenders committing the predicate offenses be NSSC gang members at the time the offenses were committed.” The defendant in *Augborne* challenged the sufficiency of the evidence to support the true finding on a section 186.22, subdivision (b) gang enhancement arguing that there was no evidence that the persons who committed the predicate offenses in that case were gang members at the time the predicate offenses were committed. (*Id.* at p. 370.) The gang expert in *Augborne* testified that four members of the same local gang in Gardena had been convicted of offenses that qualified as predicate offenses, including possession of marijuana for sale, robbery, and two burglaries (§ 186.22, subd. (e)(2), (4), (11)). (*Augborne*, at p. 370.) However, there was no evidence that the perpetrators were gang members at the time they committed the offenses. Interpreting section 186.22, subdivision (e), the court concluded that “none of the elements of the gang enhancement statute require the two or more persons committing the two predicate crimes be gang members *at the time* the offenses were committed. Defendant’s legal contention that the two section 186.22, subdivision (e) predicate crimes had to be committed by two persons *when* they were gang members requires we add an additional element to section 186.22, something we are prohibited from doing.” (*Id.* at p. 375.)

The Attorney General’s reliance on *Augborne* is misplaced. *Augborne* did not address the issue presented here and the evidence in *Augborne* demonstrated that the four men who committed the predicate offenses were all members of the same local gang, at least by the time of the defendant’s offense.

The Attorney General also relies on *Jose P.*, a case in which this court rejected a defense argument that “the evidence of gang activity must be specific to a particular local street gang, not to the larger Norteño organization.” (*Jose P.*, *supra*, 106 Cal.App.4th at p. 467.) In *Jose P.*, we discussed this court’s decision in *Valdez*, stating, “In that case, a group of individuals from a number of different Norteño cliques or gangs in San Jose came together one day and formed a caravan to attack Sureños. Given the expert testimony [in that case], we stated, ‘At the time it assembled, the caravan was not a “criminal street gang” within the meaning of the [gang] enhancement allegation. Moreover, their common identification as Norteños did not establish them as a street gang, for, as [the expert] testified, Norteño and Sureño are not the names of gangs.’ ” (*Jose P.*, at p. 467.) In *Jose P.*, we stated that “*Valdez* does not hold that there is no criminal street gang called Norteño. Moreover, the expert testimony in *Valdez* was evidence in that case, not this one. It is irrelevant to our determination of whether there is substantial evidence to support the gang findings here.” (*Ibid.*)

The gang evidence in *Jose P.* was very different from that presented in *Valdez*. The juvenile court in *Jose P.* sustained allegations that the minor had committed home invasion robbery, false imprisonment, first degree burglary, and active participation in a street gang. The court also found true gang enhancement allegations related to the first three offenses. (*Jose P.*, *supra*, 106 Cal.App.4th at pp. 461, 465.) On appeal, the minor challenged the sufficiency of the evidence to support the gang offense and the gang enhancements arguing, as noted previously, that “the evidence of gang activity must be specific to a particular local street gang, not to the larger Norteño organization.” (*Id.* at p. 467.) The gang expert in *Jose P.* testified that the Norteño gang was an “on-going organization having around 600 members or associates in Salinas” and that there were separate factions or cliques within the gang, including the Santa Rita subgroup and the Salinas East Market (SEM) subgroup, and that the subgroups were loyal to one another and the larger Norteño street gang and followed the same bylaws. (*Id.* at p. 463.) The

gang expert testified regarding four predicate offenses, two committed by SEM gang members, one committed by a “Norteño,” and one committed by a Kilbreth Street Norteño gang member. As was done in this case, the gang expert described various police contacts with the minor, stating that he had been contacted on several occasions with Norteño gang members, Santa Rita gang members, and an SEM gang member. (*Id.* at pp. 463-464.) This court held that the gang evidence in that case was sufficient to support the substantive offense and the enhancements.

In our view, this case is factually distinguishable from *Jose P.* First the evidence in *Jose P.* involved gang members in one city, Salinas. Here, the prosecution relied on predicate offenses in Watsonville to prove the existence of a Santa Cruz gang. One of those offenses was territorial in nature, relating to a particular neighborhood in Watsonville. Second, in *Jose P.*, there was evidence that the minor associated with gang members from various Norteño subgroups and that the subgroups were all loyal to one another and the larger Norteño gang. Here there was no such evidence. In each of the police contacts Detective Vasquez described, defendant was found in the presence of other NSSC members. Third, the minor in *Jose P.* had prior convictions for auto theft and attempted robbery, which when coupled with the charged offenses, were sufficient to prove the predicate offenses.

This case is also distinguishable from *People v. Ortega* (2006) 145 Cal.App.4th 1344, where three Norteño gang members worked together to commit a murder for monetary gain. The gang expert in that case testified that Norteño is a criminal street gang made up of 20 to 25 different subsets in Sacramento. (*Id.* at p. 1354.) He opined that the defendant was a Norteño, specifically a Barrio North Side Norteño, and that the other two men involved in the murder were Norteños without identifying the subset or subsets to which they belonged. (*Ibid.*) The gang expert testified that the Norteño gang’s primary activities were “murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing.” He also testified regarding two shootings committed by

Norteños, including “a shooting into a crowd of rival gangsters” and the shooting of someone who was wearing Sureño colors. (*Id.* at p. 1356.) The court rejected the “defendant’s assertion that the prosecution had to prove precisely which subset was involved” in the case. (*Id.* at pp. 1356-1357.) The court observed that “No evidence indicated the goals and activities of a particular subset were not shared by the others. There was sufficient evidence that Norteño was a criminal street gang, that the murder was related to activity of that gang, and defendant actively participated in that gang.” (*Id.* at p. 1357.) The court stated, “In this case there was testimony that it was not uncommon for members of different gangs to work in concert to commit a crime. In light of the nature of gang structure and the apparent willingness of members to work with other gangs to commit crimes, requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task.” (*Ibid.*) This case is distinguishable from *Ortega* because there was no evidence that the different subsets of the Norteño umbrella gang worked together to commit the predicate offenses in this case.

Here, the prosecution relied on evidence of offenses committed by Norteño gang members who belonged to subsets of the Norteño gang that were different from the NSSC and that operated miles away from the NSSC. It did so because, as the court acknowledged, the prosecution was unable to marshal any evidence that NSSC members had been convicted of any of the crimes that qualified as predicate offenses under the statute. NSSC was a relatively small gang that was disorganized. Although the NSSC had been in existence for more than 10 years, its members apparently had not committed any of the gang felonies enumerated in section 186.22, subdivision (e) within the statutory time frames.

At oral argument, we asked the Attorney General whether the prosecutor could have relied on offenses committed in Salinas which is in Monterey County, as predicate offenses in this case. The response was “yes,” that any Norteño offenses committed

anywhere in the state would qualify as a predicate offense in this case. We disagree. In our view, the “umbrella” of the larger Norteño street gang coupled with crimes committed by other separate and geographically distinct “subset” gangs should not be used to criminalize activity that otherwise would not fall under section 186.22. To hold otherwise would place no limits on the proof of requisite predicate offenses. A prosecutor in a community that does not have a large or established gang presence could always use the activities of Norteño gang members in other parts of the state where Norteño gangs are more prevalent to prove predicate offenses. Such an umbrella casts too great a shadow.

We conclude that there was insufficient evidence of NSSC’s primary activities or a pattern of criminal activity to support the guilty verdict on the active participation count or the true finding on the gang enhancement.

#### **DISPOSITION**

The judgment is reversed. The trial court is ordered to (1) vacate the guilty finding on count 2 (active participation in a criminal street gang); (2) vacate the true finding on the gang enhancement on count 1 (robbery); and (3) strike the concurrent sentence on count 2. The guilty finding and sentence on count 1 (robbery) are

unaffected by our disposition. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

---

McAdams, J.

WE CONCUR:

---

Bamattre-Manoukian, Acting P.J.

---

Duffy, J.